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No. 288

In the Supreme Court of the United States

October Term, 1944

W. S. D. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 289

W. S. D. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 47–51) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 29, 1944 (R. 51). The petition for a writ of certiorari was filed July 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTION PRESENTED

Whether an action brought by the United States to collect the unpaid portion of a fine imposed seventeen years before in a federal criminal proceeding is barred by R. S. § 1047 (28 U. S. C. 791) which provides a five-year period of limitation on a "suit or prosecution for any penalty or forfeiture."

STATUTES INVOLVED

R. S. § 1041 (18 U. S. C. 569) provides in part:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. * * *

R. S. § 1047 (28 U. S. C. 791) provides in part:

> No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued. * * *

STATEMENT

On April 22, 1924, petitioner was convicted in the United States District Court for the Southern District of California, on an indictment in three counts charging him with smuggling liquor into the United States, in violation of Sections 593 and 813 of the Tariff Act of 1922, and with conspiring to do so, in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 6–7, 10–20, 22–23). On April 25, 1924, he was sentenced to imprisonment for two years on each count, the terms to run concurrently, and to pay a fine of $10,000 on the first count, $1 on each of the other counts, and to stand committed until the fine was paid (R. 7, 23–25). Petitioner served the term of imprisonment (R. 7), and after completion of his sentence, being without funds to pay the fine, he served an additional thirty days, executed a pauper's oath, and was thereupon discharged from imprisonment (R. 7). Thereafter an execution was issued on the judgment imposing the fine, and $51.35 was collected (R. 7).

In 1928 petitioner became a resident of the State of Washington (R. 8). No further sums were realized on the judgment of conviction, and no further proceedings were had (R. 33) until April 1, 1941,[1] when the United States in-

[1] The date April 1, 1921, appearing at page 4 of the record is manifestly erroneous. The date April 1, 1941, appears in

stituted the present suit in the United States District Court for the Western District of Washington to obtain a judgment based upon the judgment of the District Court for the Southern District of California (R. 2–4).

A trial was had upon an agreed statement of facts (R. 31), after which the district court entered findings of fact (R. 31–33) and conclusions of law holding that the United States was entitled to judgment (R. 33–34). Judgment was entered against petitioner for $9,950.65 and costs (R. 35). On appeal, the judgment was affirmed by the Circuit Court of Appeals (R. 51).

ARGUMENT

Petitioner's sole contention is that the suit instituted by the Government in 1941 seeking a new judgment based on the 1924 judgment of the convicting court is a suit for a "penalty" within the meaning of R. S. § 1047 (*supra,* p. 2) and, accordingly, is barred by the provision of Section 1047 that "no suit * * * for any penalty * * * accruing under the laws of the United States, shall be maintained * * * unless the same is commenced within five years from the time when the penalty * * * accrued." Since an action to obtain a new judgment on the basis of an earlier criminal judgment imposing a fine is not an action for a penalty, we submit that petitioner's contention is without merit.

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the opinion of the Circuit Court of Appeals (R. 48) and in the petition for certiorari (Pet. 3).

The history of R. S. § 1047 and the cases decided thereunder make it clear that the suit for a penalty or forfeiture which is barred by the five-year limitation is one in which the action is upon a statutory liability. The suit must be brought within five years after the penalty accrued—when the violation of law took place. *United States* v. *Maillard,* 26 Fed. Cas. No. 15709 (D. N. Y.). The statute does not apply to a new suit brought to collect the penalty assessed. Cf. *Durning* v. *McDonnell,* 86 F. (2d) 91, 92 (C. C. A. 2) and cases there cited. R. S. § 1047 appears to have originated in the Act of March 2, 1799, 1 Stat. 627, c. 22, entitled "An act to regulate the collection of duties on imports and tonnage." (See note to 28 U. S. C. 791.) Section 89 of that act provided the method whereby "penalties, accruing by any breach" of the act could be sued for and recovered, with a proviso declaring that "no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred." See *Stockwell* v. *United States,* 13 Wall. 531, 542–543. Thereafter, Section 4 of the Act of February 28, 1839, 5 Stat. 322, extended the time within which to institute suits or prosecutions for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the

United States" to five years "from the time when the penalty or forfeiture accrued." The quoted words now appear in R. S. § 1047. The Circuit Court of Appeals properly held, we think, that this phraseology "has reference merely to the time of the commission of the offense or the doing of the act by which the penalty or forfeiture was incurred" (R. 50).[2] It imposes no time limit upon the enforcement of a penal judgment.

The Government's right to enforce the payment of a fine imposed by a judgment in a criminal case may be effectuated by using the procedure provided by Section 1041 of the Revised Statutes (*supra,* p. 2). That section provides that a judgment in a criminal case imposing a fine "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced," and no period of limitation upon such a proceeding is specified.

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[2] Petitioner asserts (Pet. 6) that the construction referred to is erroneous, since, in reaching it, the court was guided by the similar construction it gave to the 1799 Act (R. 49). According to petitioner, the 1799 Act was limited to a specific class of cases, while the Act of February 28, 1839, covered all cases of penalties or forfeitures. However, we think the distinction is without significance. The most that can be attributed to the 1839 Act in this regard is an extension of the limitation provision to all penalties or forfeitures. The 1839 Act did no more affect or comprehend enforcement of criminal judgments than did the 1799 Act. It may be noted that it has been held that the time limitation set forth in Section 4 of the 1839 Act has no application to a prosecution for an offense punishable by imprisonment. *United States* v. *Brown*, 24 Fed Cas. No. 14,665 (D. Mass.).

The Government is not restricted, however, merely to levying an execution but may resort to customary procedures in aid of execution, such as a creditor's bill (*Pierce* v. *United States,* 255 U. S. 398)[3] or an action on the judgment itself (*Custer* v. *McCutcheon,* 283 U. S. 514, 519; *Schodde* v. *United States,* 69 F. (2d) 866 (C. C. A. 9)).[4]

Unless R. S. § 1047 is applicable to an action upon a criminal judgment imposing a fine, there is, as stated by the Circuit Court of Appeals (R. 49), no time limitation controlling the enforcement of such a judgment. Certainly, where the Government endeavors to collect a fine by the specific method of execution provided by R. S. § 1041, R. S. § 1047 is not called into operation. Accordingly, it should not be any more applicable merely because enforcement is sought through a suit in aid of execution.

While it may be, as urged by petitioner (Pet. 7–8), that the word "penalty" for some purposes comprehends a fine,[5] we submit that R. S.

[3] In the *Pierce* case, this Court held that Section 1041 permitted the Government to enforce a criminal judgment against a corporation by a creditor's bill against the transferees of the corporate assets.

[4] In the *Custer* case, it was stated that a civil judgment in favor of the Government could be enforced by an action upon the judgment. Such an action was also upheld in the *Schodde* case.

[5] In view of the varied meanings accorded the word "penalty" (Cf. *Huntington* v. *Attrill,* 146 U. S. 657, 666–667; *United States* v. *Tsokas,* 163 Fed. 129, 130 (D. N. Y.)),

§ 1047, upon which petitioner relies, is not intended to cover proceedings of a supplemental nature directed towards the enforcement of a judgment rendered upon conviction of a crime. We believe that a reasonable construction of that section leads to the conclusion that it is limited to direct suits or prosecutions for the imposition of a penalty or forfeiture.

Petitioner also suggests (Pet. 10–11) that to hold R. S. § 1047 inapplicable under the circumstances presented by this record is inequitable, for although he has served his term of imprisonment and an additional thirty days for nonpayment of the fine, the Government is still endeavoring to collect the fine more than five years after its imposition, thereby in effect subjecting him to a continuing liability. However, it is settled that an indigent convict, who, like petitioner, is committed until his fine is paid and is thereafter discharged from further imprisonment upon taking a pauper's oath, pursuant to 18 U. S. C. 641,[6] is not thereby relieved from the obligation to pay the fine imposed by the judgment of conviction. *Grier* v. *Kennan,* 64 F. (2d) 605, 606 (C. C. A.

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cases not dealing with the precise question here presented are of no aid. None of the cases cited by petitioner are concerned with that question.

[6] R. S. §§ 1042 and 5296 (18 U. S. C. 641) provide in part:

"When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, * * * has been confined in prison thirty days, solely for the nonpayment of

8); *United States* v. *Pratt,* 23 F. (2d) 333 (D. N. H.).

CONCLUSION

The case was correctly decided below. There is involved no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
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AUGUST 1944.

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such fine, or fine and costs, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts. * * *"

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